



SB 205: Consent for Forensic Sexual Assault Exams

September 5, 2012

Overview



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Study Authorization



- Senate Bill 205 (SB 205), introduced by Senator George Barker during the 2012 Regular Session of the General Assembly, sought to address situations where victims are unable to provide consent for a sexual assault examination due to unconsciousness, mental incapacity or being under the age of 18.
- The bill was referred to the Crime Commission for study by letter from the House Courts of Justice Committee.

Study Authorization



- Specifically, SB 205 proposed modifications to Va. Code §§ 37.2-1104, 54.1-2969, 54.1-2982, and 63.2-1520 to:
 - Allow a judge to approve the collection of forensic evidence, when a sexual assault is suspected, from an adult unable to make an informed decision;
 - Permit a minor, 14 years or older, to consent to a forensic evidence exam for suspected sexual assault; and,
 - Allow for the collection of forensic evidence from a minor child without the consent of a parent or guardian.

Background



- There are very few studies that address the issue of consent for a forensic sexual assault exam, but they do highlight similar problems or concerns:
 - Sexual assault exams fall into a “grey area” between providing care and collecting evidence.
 - Delays in performing the examination could make it more difficult to secure evidence, increasing the difficulty in prosecuting a case of sexual assault.
 - Concern that either performing or not performing the exam could open the Forensic Nurse Examiner (FNE) to civil liability.

Background



- In instances when consent cannot be obtained, there is a split in opinion amongst professionals:
 - Current medical consent practices are sufficient to permit the forensic exam; or,
 - A court order or statutory authority is needed before the exam can be conducted.

Background



- A FNE is a registered nurse who has specialized forensic training in treating crime victims and collecting evidence of a crime, to include sexual assault.
- These nurses often perform the FNE function in addition to their regular nursing job.
- They can perform work as a FNE either for a hospital, at the request of law enforcement, or a Commonwealth's Attorney, or as part of a Sexual Assault Response Team (SART).

Background



- They have a dual function in most cases, providing medical care and collecting evidence.
- FNE nurses often testify in criminal cases.
- According to the Virginia Chapter of the International Association of Forensic Nurses, there are 17 FNE programs across the Commonwealth.
- Currently, there are about 100 FNEs in Virginia.

Background



- A Physical Evidence Recovery Kit (PERK) is an evidence collection kit used to collect and preserve physical evidence of sexual assault.
 - The physical exam can take between 2-4 hours.
- This kit is provided by the Virginia Department of Forensic Science (DFS) and is returned to DFS for testing and analysis.
- DFS has received a total of 2,832 PERK kits for analysis in the past 5 fiscal years (FY08-FY12).
 - An average of 566 per year.

Virginia Law



- Virginia, like every other state, requires medical care personnel to obtain informed consent from patients before providing treatment. Basically, the patient must be warned of the dangers or negative consequences, and alternatives to the treatment or procedure. Tashman v. Gibbs, 263 Va. 65, 73 (2002).

Virginia Law



- Va. Code § 54.1-2982 provides a statutory definition of capacity for informed consent that is applicable to advanced medical directives:
 - "Incapable of making an informed decision" means the inability of an adult patient, because of mental illness, intellectual disability, or any other mental or physical disorder that precludes communication or impairs judgment, to make an informed decision about providing, continuing, withholding or withdrawing a specific health care treatment or course of treatment because he is unable to understand the nature, extent or probable consequences of the proposed health care decision, or to make a rational evaluation of the risks and benefits of alternatives to that decision. For purposes of this article, persons who are deaf, dysphasic or have other communication disorders, who are otherwise mentally competent and able to communicate by means other than speech, shall not be considered incapable of making an informed decision."

Virginia Law



- There is implied consent in emergency situations where the patient is unable to provide consent. Washburn v. Klara, 263 Va. 586, 590 (2002).

Virginia Law



- Va. Code § 37.2-1104 allows a judge to order the temporary provision of care with a showing of probable cause that an adult is unable to consent to treatment for a mental or physical disorder.
- Va. Code § 54.1-2969 allows a minor child, 14 years or older, to consent to emergency care, and some medical procedures.

Virginia Law



- Additionally, Va. Code § 54.1-2970 allows medical personnel to provide medical care to patients under the care of the Department of Behavioral Health and Developmental Services or a community services board when the delay may “adversely affect recovery.”

Virginia Law



- The concept of informed consent applies to FNEs.
- When a victim of suspected sexual assault cannot consent (either because of mental incapacity or age) to the forensic exam, the FNE could face:
 - criminal charges for battery or sexual assault; or,
 - civil liability.
- Currently, there are no provisions under Virginia law that specifically permit sexual assault exams without consent.

Virginia Law



- However, it is possible to obtain a search warrant to authorize a forensic sexual assault exam.
 - Va. Code § 19.2-53(4): “Any object, thing, or person, including without limitation, documents, books, papers, records or body fluids, constituting evidence of the commission of crime.”

Virginia Law



- There are two possible options when a child is suspected to have been abused by a parent or caregiver:
 - An emergency removal order under Va. Code § 16.1-251; or,
 - A child may be taken into custody by a physician, child protective worker, or law enforcement, without the consent of parents or guardians, under Va. Code § 63.2-1517.
 - However, a hearing under Va. Code § 16.1-251 is required within 72 hours.
 - Decisions for medical care are permitted by Va. Code § 54.1-2969(A)(2)(ii).

Virginia Law



- Additionally, Va. Code § 19.2-165.1(B) states, “Victims complaining of sexual assault shall not be required to participate in the criminal justice system or cooperate with law-enforcement authorities in order to be provided with such forensic medical exams.”
 - With minor victims, medical personnel are required to report suspected abuse under Va. Code § 63.2-1509.

Virginia Law



- The U.S. Department of Justice’s National Protocol for Sexual Assault Medical Forensic Examinations suggests that FNEs should follow state law governing consent and access to the exam when presented with vulnerable adult patients or adolescents/minors.
- The Virginia Department of Criminal Justice Services’ model policy for SART teams suggests:
 - “If a victim is unresponsive (i.e., unconscious) but a sexual assault is suspected, a magistrate can authorize the exam, if the victim cannot provide consent within a reasonable period of time.”

50 State Review



- There are only a few states that address the issue of consent to a sexual assault exam by statute.
 - 10 states require consent from the victim before the exam can be performed: California, Connecticut, Illinois, Indiana, Kansas, Kentucky, Missouri, Nebraska, Ohio, and Wyoming.

50 State Review



- Only one state allows the performance of a sexual assault exam on a victim who cannot consent.
 - Maine - “Implied consent. If an alleged victim of gross sexual assault is **unconscious** and a reasonable person would conclude that exigent circumstances justify conducting a forensic examination, a licensed hospital or licensed health care practitioner may perform an examination in accordance with the provisions of this section.” Me. Rev. Stat. tit. 24, § 2986.

50 State Review



- There are 6 states that permit a minor to consent to a sexual assault exam.
 - Illinois, Kansas, Kentucky, Missouri, Ohio, and Wyoming.
 - In Kansas, Kentucky, and Ohio the consent to the examination is not subject to “disaffirmance” by a parent or guardian.
- In California, in cases of “known or suspected” child abuse, consent is not required from the parents or guardians.

Surveys



- Staff conducted an informal telephone survey with nurses from the Virginia FNE programs.
 - Many feel that their current practice is adequate and if a situation requires something outside normal practice:
 - A search warrant may be obtained;
 - Judicial approval may be obtained under Va. Code § 37.2-1104; or,
 - Law enforcement or DSS may be contacted to obtain consent with regard to a minor victim.
 - Some feel that even though current practice is adequate, a specific statutory authorization would be beneficial to protect both the victim and medical personnel.

Policy Considerations



- Should Virginia allow sexual assault exams if the victim cannot give consent? Options:
 - Adult victims who are unable to consent.
 - Minors 14 years or older who are physically able to consent.
 - Minor children without the consent of a parent or guardian.
- Should Virginia modify the Code to allow a judge to issue specific permission to conduct a sexual assault exam?

Additional Issue



- Currently, Va. Code § 63.2-1520 does not allow photographs or x-rays to be taken of adults in abuse cases.
- FNEs suggested that this section be modified to allow for photographs and x-rays of adults to assist in elder abuse cases.
- Policy Option: Should the Virginia Code be modified to allow for photographs and x-rays of adults suspected of being abused?



Discussion
